The Madras Law Journal.

Part IV.] APRIL 1898. [Vol. VIII.

ILLEGITIMATE SON OF A SUDRA.

The right of illegitimate sons in general to maintenance has been dealt with in a previous article [*vide* 7 M. L. J., 363]. The Hindu Law confers on the *dási-putra* of a Sudra the right to inherit to his putative father under certain circumstances.

The following are the Hindu Law texts on the subject:

I. Mitakshara.

1. The author next delivers a special rule concerning the partition of a *Sudra's* wealth.

a. " Even a son begotten by a *Sudra* on a female slave, may take a share by the father's choice.

But if the father be dead, the brethren should make him partaker of the moiety of a share; and one, who has no brothers may inherit the whole property in default of daughter's sons."—Yajnavalkya 133 *a*—134).

2. The son begotten by a *Sudra* on a female slave obtains a share by the father's choice or at his pleasure. But, after the [demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share, that is, let them give him half [as much as is the amount of one brother's] allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only.

3. From the mention of a *Sudra* in this place, [it follows that] the son begotten by a man of a regenerate tribe on a female slave does not

obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance.

II. Dayabhaga.

"If a son is born to a *Sudra* by a slave woman (or dasi), or by a slave's slave woman (*Dasa-dasi*), he may if permitted take one share. With these words the rule of right is established."—Manu IX, 179.

But the son of a *Sudra* by a female slave or other unmarried *Sudra* woman, may share equally with other sons by consent of the father. Thus Manu says: "A son begotten by a man of the servile class on his female slave or on the female slave of his slave may take a share of the heritage, if permitted: thus is the law established. IX, 179.

Without such consent, he shall take half a share, as Yajnavalkya directs; "even a son begotten by a *Sudra* on a female slave, may take a share by the choice of the father; if the father be dead, the brethren should make him partake of half a share," (2, 134).

Begotten on an unmarried woman, and having no brother, he may take the whole property; provided there be not a daughter's son. So Yajnavalkya ordains: "One who has no brother may inherit the whole property, for want of daughter's sons," (2, 135).

But if there be a daughter's son, he shall share equally with him; for no special provision occurs, and it is fit that the allotment should be equal; since the one, though born of an unmarried woman, is son of the owner, and the other, though sprung from a married woman is only his daughter's son.

III. Dattaka Chandrika.

Since, in the following texts of Manu and Yajnavalkya respectively, a share equal to that of the legitimate son is prescribed for the son even by a female slave of a man of the class in question (*Sudra*); and the co-heirship with the daughter's son of such son only when having no brother is intimated; the equal partition of the son of the wife, the son given and the rest, with the real legitimate son whilst the father lives, and their succession to the moiety of the share of such son, where the father may be dead at the time of partition, follow *à fortiori*. And otherwise, there would be a great inconsistency if, where the son of the wife, the son given and the rest took the fourth of the share of the legitimate son, the son by a female slave whose title is infinitely inferior in respect to these were to take an equal share with the legitimate son (Manu and Yajnavalkya are then quoted).

If according to this authority, where there be no son of the wife and the rest, but there may be a wife and daughters, the daughter's son be entitled to share [with the son by a female slave] the rule for the succession of the daughter [or other proper heir] would be infringed; therefore, if any even in the series of heirs down to the daughter's son exist, the son by a female slave does not take the whole estate; but on the contrary shares equally with such heir.

Upon the above texts, the first question that presents itself for discussion is as to the definition of *dāsī-putra*. On this point, there is a direct conflict between the High Court of Calcutta on the one hand and the High Courts of Bombay, Madras and Allahabad on the other. In Bengal only the illegitimate son by an unmarried female *slave* can inherit to a Sudra; and as slavery has become impossible after Act V of 1843, this part of the law has become obsolete, (*Narain* v. *Rakhal*, I. L. R., 1 C. 1; *Kirpal Narain* v. *Sukurmoni*, *Ib.*, 19 C. 91). In Madras, Bombay and Allahabad, the word, *dāsī-putra* includes not only the son by a female slave, but a son by any unmarried Sudra woman kept as a continuous concubine. (*Rahi* v. *Govind*, I. L. R., 1 B. 97; *Sadu* v. *Baiza*, I.L.R., 4, B. 37, 44; *Pandaiya* v. *Puli*, I. M. H. C. R., 479; *Inderun* v. *Ramasamy*, 13 M. I. A., 141; *Muthusamy* v. *Venkatasubba*, 2 M. H. C. R., 293; S. C., on appeal 12 M. I. A. 203). It is needless to discuss the authorities on this question very minutely. It seems to be pretty clear that the view of the Calcutta High Court is supported by the Sanskrit texts, while that of the other High Courts is in accordance with the altered consciousness of the people subsequent to the time of the text writers. (Sarvadhikari pp. 938-942).

In early times, illegitimate sons born of a permanent concubine of a Sudra seem to have held a position intermediate between that of a legitimate son and that of a bastard born of a mere promiscuous or illicit intercourse. Such a concubine would generally be a slave absolutely under the man's control and the union between them was not illegal. Legality, or rather, absence of illegality, continuousness and exclusiveness are characteristics of the connection necessary to entitle the offspring thereof to rights of inheritance. Accordingly, it has been held that the son born of an incestuous or adulterous connection is not entitled to inherit. (*Dattiparisi* v. *Datti Bangaru*, 4 M. H. C. R., 204, 215; *Venkatachalla* v. *Parvatham*, 8 M. H. C. R., 134; *Rahi* v. *Govind*, I. L. R., 1 B. 97; *Kuppa* v. *Singaraveloo*, *Ib.*, 8 M. 325; *Dalip* v. *Ganput*, *Ib.*, 8 A. 387).

During the father's life-time the illegitimate son of a Sudra may, if the father chooses, be given one share, along with the legitimate sons. The matter is one entirely in the discretion of the father. The illegitimate son has no legal right and cannot sue the father for partition. His share, if he is given one, would be equal to that of a legitimate son.

After the demise of the father, if there be sons of a wife, the illegitimate son of a Sudra participates for half a share. As against the legitimate sons, he is entitled as of right and can enforce a partition by suit. (*Sadu* v. *Baiza*, I. L. R., 4 B. 44, 45; *Thangum Pillai* v. *Suppa Pillai*, *Ib.*, 12 M. 401; A. S. 84 of 1885, unreported.)

According to the texts quoted above, the share of the illegitimate son will have to be fixed as follows: He would get half of what he would get if he were legitimate. If there are more illegitimate sons than one, the share of each will be half of what he would get if all of them were legitimate. If there is one illegitimate son and one legitimate son, the former will get one-quarter share. If there are two legitimate sons, he will get one-sixth. If there are two illegitimate sons and one legitimate son, the former will get each one-sixth. If there are x illegitimate sons and y legitimate sons, the share of each illegitimate son will be $\frac{1}{2(x+y)}$ of the whole inheritance. (Mayne, S. 407).

But here, as in the mode of calculating the share of an adopted son when there is a subsequently born *aurasa* son, there is a difference of opinion. The share of an illegitimate son is said to be half of what the legitimate son actually gets. If there is a number of illegitimate sons and legitimate sons, each one of the former will get half of what each one of the latter gets. If there is one illegitimate son and one legitimate son, the former will, according to this view, get one-third and the latter two-thirds. If there are two legitimate sons, the illegitimate son will get one-fifth and each of the legitimate sons will get two-fifths. If there are two illegitimate sons and one legitimate son, each of the former will get one fourth and the latter half. If there are x illegitimate sons and y legitimate sons, each illegitimate son will get $\frac{1}{x+2y}$ of the inheritance. (W. and B. 381, 384; *per curiam*, *Sadu* v. *Baiza*, I. L. R., 4 B. 52; *Joyendra Bhupati* v. *Nityanand Man Sing*, *Ib.*, 11 C. 715).

There is no case actually deciding this point. Although the Bombay and Calcutta High Courts seem to be inclined to take the latter view, the former view appears to be the more natural and correct one.

The law as to the rights of an illegitimate son of a Sudra when there is no son by a wife is not quite settled—at least out of the Madras Presidency. The texts quoted above seem to lay down the law as follows: An illegitimate son having no brothers takes the whole estate if there be no widow, daughter or daughter's son. He would exclude the heirs who, according to the ordinary rules of the Hindu Law of Inheritance, come in after a daughter's son, *viz.*, mother, father, brother, &c. But if there be widow, daughter or daughter's son, he takes half the estate, the other half going to the widow, daughter or daughter's son as the case may be, just in the same way as the whole of the inheritance would have gone if there were no illegitimate son. *Chinnammal* v. *Varadarajulu* (I. L. R., 15 M. 307) is a decision on this point. There the widows of a shrotriemdar, a Sudra, sued his illegitimate son for a declaration that they were entitled by inheritance to the whole of the shrotriem of which they alleged they were in possession. The defendant claimed to be legitimate and pleaded that the suit was bad as he was in possession and no consequential relief was prayed for by the plaintiffs. The District Judge found defendant legitimate and in possession, held the suit unsustainable by reason of the proviso to S. 42 of the Specific Relief Act and dismissed the suit. On appeal the High Court reversed the District Judge's decision on the two points decided by him and the question consequently arose whether the plaintiffs were entitled to succeed to the whole or half of the estate as against the illegitimate son. Their Lordships (*Collins*, C. J., and *Handley*, J.) made a declaration that the plaintiffs were entitled to half the estate holding as the general result of the authorities so far as they were agreed, that, if there be a widow, daughter or daughter's son and an illegitimate son, the latter takes half the estate leaving the other half to be enjoyed as woman's estate by the widow, daughter or daughter's son in succession. The same view had already been taken by the Madras High Court in *Krishnayan* v. *Muthusawmy* (I. L. R., 7 M. 407); *Ranoji* v. *Khandoji* (I. L. R., 8 M. 557), and *Parvati* v. *Thirumalai* (I. L. R., 10 M. 334)—though this point did not actually arise for decision in those cases.

There cannot be any doubt that the view taken by the Madras High Court is the correct one. It puts a natural construction on the language of the Sanskrit texts and the conclusion arrived at is quite in harmony with the general principles of the Hindu Law of Inheritance. But the Bombay and the Calcutta High Courts have taken a different view, and, though the point has not been actually decided by them, they are strongly of opinion that the *dasi-putra* of a Sudra would exclude the widow altogether. The following are the considerations on which this view is based:—

(1) At an early stage of Hindu Law the daughter's son—especially the son of an appointed daughter—ranked above the widow, and the daughter like other sons. Vijnanesvara whose work belongs to this stage says that the illegitimate son of a Sudra takes after him. Vijnanesvara introduced a change by placing the daughter above the daughter's son. Among the regenerate classes among whom the higher forms of marriage prevailed and the wife shared her husband's sacrifices, the widow was in course of time given a place before the daughter. But among Sudras, the wife did not occupy so high a place and she has continued to hold the position originally allotted to her.

(2) The Mitakshara omits to mention the widow as one of those who share the estate equally with the illegitimate son.

(3) In dealing with different classes of heirs, Vijnanesvara takes up the succession of sons, principal and secondary, and on failure of them, then the order of succession among all tribes and classes. Ch. I., Section XII., which deals with the topic in hand, is the last section of Ch. I. which deals with sons and Ch. II. begins thus: "That sons, principal and secondary, take the heritage, has been shown. The order of succession among all tribes and classes is next declared." Then the widow and other heirs are mentioned. The illegitimate son being one of the secondary sons and being mentioned before the widow and other heirs, the widow is entirely excluded by the illegitimate son of a Sudra.

We shall deal with these considerations in their order.

(1) This theory, for which West and Buhler alone are responsible, seems to be no more than a gratuitous assumption. There is absolutely no authority for it. No decision, no text-writer is

quoted in support of it. The Bombay High Court, no doubt, have given countenance to this theory. But they do not quote any other authority than West and Buhler. As this subject has been dealt with at length in 1 M. L. J., 66, we do not go into it in greater detail.

(2) The next argument is that based on the omission of the widow from the list of heirs who share with the illegitimate son. But this omission is quite inadequate to justify the conclusion arrived at. It does not appear to be necessary to suppose that, in the case of an illegitimate son intervening, Vijnanesvara upset the usual order of inheritance under which the widow would come in before the daughter and daughter's son. On the other hand, the omission is easily explained. Yajnavalkya mentions the daughter's sons as excluding the illegitimate son as to half the estate. Vijnanesvara mentions the daughters also. Obviously the meaning is until the line of heirs according to the ordinary Hindu Law ending with the daughter's son is exhausted, the illegitimate son does not take the whole estate but only half. It is unnecessary to mention the widow who stands in the order of succession next before the daughter. This is what Nandapandita expressly lays down. (Dattaka Chandrika, V., 30, 31). It seems to us that it may with better reason be argued from the omission of the widow that she excludes the illegitimate son altogether. The rule that gives the illegitimate son of a Sudra a share is an exceptional one. It should, therefore, be strictly construed so that the rights of persons not expressly said to be affected thereby would remain intact. The widow not being mentioned would not be affected by the rule and would exclude the illegitimate son altogether.

(3) The argument from the position of the passage in question in the Mitakshara appears on the face of it unsound. It goes too far. If it were good, the illegitimate son would exclude not only the widow but the daughter and daughter's son as well. The Bombay High Court takes this anomalous result as intended by the text writers and attributes it to their arbitrariness of arrangement and faulty exegetics. The solution of the question offered by the Madras High Court in I. L. R. 15 M. obviates all the difficulties on which one is landed by following the line of argument adopted by the Bombay High Court.

[*Rahi* v. *Govinda*, I. L. R., 1. B. 97; *Sadu* v. *Baiza*, 4 B. 37; *Jogendro Bhupati* v. *Nityanund Man Sing*, *Ib.* 11 C. 702; *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanund Man Sing*, *Ib.* 18 C. 152; *Krishnayan* v. *Muthusawmy*, I. L. R., 7 M, 407; *Ranoji* v. *Khandoji*, I. L. R., 8 M 557; *Parvati* v. *Tirumalai*, I. L. R., 10 M. 334; *Shesgiri* v. *Girewa*, I. L. R. 14 B. 282; *Chinnammal* v. *Varadarajulu*, I. L. R., 15 M. 307; Mayne, paras. 506, 507.]

It should be noted that, where there is an illigitimate son, a widow and a daughter, the half inherited by the widow would descend to the daughter after her, and on the daughter's death, would revert to the legitimate son. But if there be a daughter's son, and if he inherit the half, it cannot revert to the illegitimate son, as the heir that will take the estate will be the heir of the daughter's son.

The next question to be dealt with relates to the co-parcenary rights of the illegitimate son. The first case that decided the question was *Sadu* v. *Baiza* (I. L. R., 4 B. 37). On the death (in 1850) of Manaji, a Sucra, Mahadu, his legitimate son, and Sadu, his illegitimate son, succeeded to the estate. They lived together for sometime after their father's death, but owing to domestic quarrels, they entered into a written agreement by which Sadu was allowed to enjoy a portion of the family property. They, however, continued joint and undivided in estate until the death of Mahadu in 1865. Sadu sued Baiza and Savitri (Manaji's two widows) and Darya (his daughter) for recovery of the property allotted to him under the agreement and got a decree in 1866. In 1870, he sued as heir of his father and brother and claimed the whole of the ancestral property. It was held that Mahadu and Sadu, having succeeded as co-parceners to the whole of the property, subject to the maintenance of the widows and daughter, the usual result of co-parcenary followed on the death of Mahadu, *viz.*, Sadu took the whole by survivorship. The following circumstances are relied on:—(1) the place in which Vijnanesvara has dealt with illegitimate sons in the Mitakshara; (2) the legitimate and the illegitimate sons being spoken of together as brothers *bhrâtarah*; (3) the postponement of the widow after the illegimate son; (4) his succession jointly with legitimate sons. It is said that these considerations show the recognition of the *dasi-*

putra's status as *son* and, consequently, as co-parcener. It is no doubt conceded that the position of an illegitimate son differs materially from that of a legitimate son: (1) The former cannot enforce partition as against his putative father. (2) As against the legitimate sons he gets only half a share. (3) He does not exclude other heirs as the legitimate son does, but shares with the daughter and the daughter's son. But this difference is held to be not so important as to affect the conclusion arrived at from the points set forth in favour of his co-parcenary rights. Two points relied on by counsel as speaking against the existence of co-parcenary rights are noticed in the judgment. The first, that the *dasi-putra* is not included in the enumeration of heirs given in the Mitakshara (ii. i. 2.) is met by the fact that the placitum only lays down the order of succession *on failure of sons,* a rule of *sapratibandha dáya* or obstructed heritage and, therefore, had no application to the case on hand. The second point, that, as the proportions which plaintiff and Mahadu were each entitled to take were fixed by law, the latter's share upon his death vested in his mother Baiza, was held bad as it went too far, for, if good, it would apply with equal force in every case of death, without male issue, of a co-parcener in an undivided Hindu family. This case was followed in *Jogendro Bhupati* v. *Nityanand Sing* (I. L. R., 11 C. 702). That was the case of an impartible *raj*. A zamindar died leaving a legitimate son and an illegitimate one by a female slave. The former succeeded to the zamindary, and on his death the question arose who was entitled to the zamindary, the illegitimate brother or the three widows or the daughter. It was held that the illegitimate brother was a co-parcener with the last owner and took the *raj* by survivorship on his death. *Sadu* v. *Baiza* was referred to and followed. The Judges who heard the case (*Garth,* C. J., and *Beverley,* J.) feeling that the question was of some difficulty consulted *Mr. Justice Mitter* who arrived at the same conclusion as the Bombay High Court. It was argued on behalf of the widows and daughter that the right of survivorship only obtained in those cases where an interest in joint property is acquired by any member of a joint family at his birth and that a *dasi-putra* could not have such a right as it was only by the father's choice or pleasure that he could obtain any share at all; and that the Mitakshara (Ch. I, S. 12) placed the *dasi-putra* in the same category and gave him the same sort

of rights as a daughter or daughter's son and, like them, the *dasi-putra* had no right of survivorship, though he might take the property as heir to his father. Their Lordships without saying anything about these arguments, held that the rule laid down in the Bombay case was correct and most consistent both with justice and authority. They observed that as illegimate sons by different mothers would all jointly participate in the property and would succeed to each other by survivorship *inter se*, there was no reason why they should not succeed in the same way to a legitimate half-brother. Reference was made to the position of the adopted son to which the position of an illegitimate son bore an analogy, in both cases there being the same sort of imperfect brotherhood to the legitimate son and in both the superior position of the legitimate son being recognized by his taking a larger share on partition. *Krishnayan* v. *Muthusami* (I. L. R., 7 M., 407) was distinguished on the ground that, in that case, the dispute was between the illegitimate son and his putative father's brother. The case went up to the Privy Council on appeal and the decision of the Calcutta High Court was confirmed (I. L. R., 18 C., 151). Their Lordships of the Privy Council simply follow the Bombay and the Calcutta rulings. *Thangam Pillai* v. *Suppa Pillai* (I. L. R., 12 M., 401) does not decide this point. It is an authority only for the proposition that an illegitimate son of a Sudra can compel a partition as against his legitimate brothers which he cannot do as against his putative fathers. This is quite consistent with his having no co-parcenary rights.

No doubt, the question is now practically concluded by authority. In the face of the Privy Council decision (I. L. R., 18 C., 151) it would be impossible to contend in any Indian Court that a *dasi-putra* of a Sudra and his legitimate son are not members of a co-parcenary. But with due deference to the august tribunal that decided the question, we venture to doubt whether I. L. R., 18 C., 151, has been rightly decided.

According to the Mitakshara, the right of the son arises by birth. And it is quite conceded on all hands, *Jogendro Bhupati* v. *Nityanand Man Sing* (I. L. R., 18 C. at p. 155 P. C.,) that the illegitimate son of a Sudra takes no vested interest by birth. During the father's lifetime, the illegitimate son's claim to half a share depends entirely on the father's sense of justice or generosity. There cannot be any co-parcenary then as between the illegitimate son on the one hand and the putative father

and the legitimate sons on the other. How can the death of the father convert him into a co-parcener which he was not before? No doubt, it has been held that the illegitimate son can compel partition as against the legitimate sons—though it is extremely doubtful whether even this is warranted by the Sanskrit text. But taking it to be so, it would appear to be more natural to infer that it was simply intended to make what would be an act of mere good sense or generosity on the part of the father, an act of duty on the part of the legitimate sons which they were bound to do, *Thangam Pillai* v. *Suppa Pillai* (I. L. R., 12 M., 403). It is very difficult to find any idea of co-parcenary here. Further, one of the chief arguments relied on was the postponement of the widow after the illegitimate son. But the Madras High Court has expressly dissented from their view (I. L. R., 15 M.) and some of the other arguments are precisely those which in the opinion of the Bombay High Court pointed to the total exclusion of the widow by the *dasi-putra*. The conception of co-parcenary pre-supposes *sapinda* relationship and a legal marriage. It is on this principle that the Madras High Court has decided that an illegitimate son cannot claim any share where the property of his father has passed by survivorship to an undivided brother (*Krishnayyan* v. *Muttusami*, I. L. R., 7 M., 407). The analogy between the position of the illegitimate son and that of the adopted son is erroneous and cannot be acted upon. "If the adopted son takes a smaller share in competition with the legitimate son, it is because he is a mere substitute provided by a fiction of law, whilst in the case of the *aurasa* there is actual blood-relationship consecrated by legal marriage. In default of a legitimate son, the fiction operated as a special rule of law to give the adopted son the same status in the family as against every one of its members. On the other hand, save as to taking an inferior share, there is no analogy between him and the illegitimate son." (I. L. R., 10 M., 345.) We are inclined to doubt very much if the Privy Council would have decided as they have done if they had the views of the Madras High Court in I. L. R., 15 M., before them.

The illegitimate son is heir only to his father and takes only to *his* estate. He has no right to the estate of collaterals, either by inheritance or by survivorship. The Hindu law recognizes no relationship between the illegitimate son and his father's kindred. And since he takes no interest by birth, his right by inheritance to his father's estate lapses by survivorship in favor of

his surviving co-parceners and, therefore, he cannot sue his brothers or nephews for a partition after his death. (2 W. Mac N. 15, n; *Nissar* v. *Kowar*, Marsh 669; *Krishnayyan* v. *Muttusami*, I. L. R., 7 M., 407; *Ranoji* v. *Kandoji*, I. L. R., 8 M., 557; I. L. R., 12 M. at 403.) But when there are legitimate and illegitimate sons, they take together as co-parceners. When they have once taken jointly, the illegitimate son takes, on the death of the legitimate son without issue, the whole by survivorship, superceding the widow altogether. (*Sadu* v. *Baiza*, I. L. R., 4 B., 37; *Jogendro* v. *Nittyanand*, I. L. R., 11 C., 702, affirmed, I. L. R., 18 C., 151.)

Under the Hindu Law, the bastard is not a *nullius filius* as in the English Law and consequently bastards are not prevented from claiming to each other. (1 M. H. R., 478.) If two bastards take jointly, on the death of one, the other takes the estate by survivorship. (*Mayne Bai* v. *Uttaram*, 2 M. H. R., 196; *Myna Boyee* v. *Ootaram*, 8 M. I. A., 400; *Sivasangu* v. *Minal*, I. L. R., 12 M., 277; *Narasanna* v. *Gangu*, I. L. R., 13 M., 133.) There cannot be any doubt as to the existence of heritable blood as between bastards and their mother.

T. JIVAJI.

TRANSLATION FROM THE VIVADARATNAKARA.

CHAPTER XXXI.

On Sons by Analogy.

On this subject Manu says: "If, among brothers of the full blood, one have a son, Manu has declared them all to be fathers by virtue of that son. If, among many wives of a man, one has a son, Manu has declared them all to be mothers by virtue of that son."(1)

Brihaspati says "Where there are many uterine brothers born of the same father and even if one of them has a son, all the brothers are declared to be fathers by virtue of that son. The same rule is declared to apply in the case of many wives of the same husband. If one of them has a son, that son shall offer the *pinda* to them all."(2) *Commentary*—Here Asahāya observes that where men have a brother's son and women a cowife's son, they should not make substitutes for sons such as *kshetraja*, etc. Pārijāta says to the same effect. And Udayakāra in his commentary says the same thing.

Here ends the chapter on 'sons by analogy.'

(1) Manu, IX, 182. (2) Brihaspati, Chap. XXV, 99 and 100.

CHAPTER XXXII.

On the Etymology of the word 'Putra.'

On this subject Manu and Vishnu say: "As the son redeems his father from the hell called *Put*, he has been called *Putra* by the Creator himself."(1)

Hárīta says: "There is a hell called *Put* and the sonless man is there tormented. And as a son redeems the father from that hell, he is called *Putra*."(2)

Brihaspati says: "Because a son redeems his father from the hell called *Put* even by the sight of his face, a man should be anxious for the birth of a son. The grandson and the son of the appointed daughter both make him attain heaven. Both are pronounced equal in the matter of inheritance and the offering of *pinda*."(3)

Manu and Vasishtha say: "If the father should behold the face of his son born alive, he shifts the burden of debt on him and attains immortality."(4)

Sankha, Likhita, and Paithinisi say: "By a son produced any where, the father prospers and becomes freed from all debt by the *pinda* which he offers to the ancestors."(5)

Hárīta says: "He who has a son, pure, capable, virtuous even in the first years of his life and able to correct his own faults, transports his ancestors beyond the regions of torment."(6)

Sankha and Likhita say: "The regular performance of Agnihotra, the study of the three Vedas and the performance of sacrifices during which rewards by the hundred had been given, do not secure a sixteenth part of the benefit which flows from the birth of the eldest son. Heaven is in his hands who is celebrated as the sire of a son and a grandson and the living father of many sons and who has not omitted to study the Vedas or perform the sacrifices."(7)
Commentary—'Akshunna' means 'not omitted.'

(1) Manu, Chap. IX, 138. (2) Cole. Dig., Vol. II.
(3) Brihaspati, Chap. XXV, 36 and 37. (4) Vasishtha, Chap. XVII, 1.
(5) Cole. Dig., Vol. II, 385, CCLXX. (6) Cole. Dig., Vol. II, 420, CCCVII.
(7) Cole. Dig., Vol. II, 420, CCCVIII.

Sankha, Likhita, Vishnu, Vasishtha and Hárīta say: "By a son, a man conquers all the worlds. By a son's son, he attains immortality and by a son of that grandson, reaches the Solar abode."(1) *Commentary*—'Bradhna' means 'Sun.'

Yājnavalkya says: "By a son, a grandson and a grandson's son, a man obtains worlds, immortality and heaven. Therefore, women must be honoured, attended to, maintained and well-protected."(2)

Vasishtha says: "Infinite are the worlds to him who has sons. The Srutis declare that there is no heaven for him who has no son. A form of curse is 'Let them die childless and be evil eaters.'"(3) *Commentary*—'Childless' means 'sonless.' 'Be' means 'become.' 'Eaters,' *i.e.*, 'evil spirits prone to eating.' It means that it is a great punishment, if, for want of a son, one should become an evil spirit. The being sonless is the destruction of enemies; so a son is desired.

This is also said: "A blessing is also thus craved—'let me attain immortality by means of issue.'"(4) *Commentary*—Prakása-kára says that the previous curse is hurled at enemies and this blessing craved for one's self.

It is said: "The son's son and the son of the appointed daughter lead to bliss and are declared equal in the matter of inheritance and offering of *pinda* and water. The sonless man should somehow strive to beget a son of any description for the offering of *pinda* and libations of water and also for the celebrity of his name. Ancestors, afraid of being thrown into hell, anxiously expect sons in the hope that one of them may travel to Gaya and transport them beyond the region of torment, that he will perform Vrishotsarga, Gayasraddha and Ishthapurtha ceremonies, that he will protect them in their old age and propitiate them every day. As a man trying to cross a stream with a bad boat sinks, just so the father of a bad son sinks in eternal gloom."(5)

Here ends the chapter on the Etymology of the word 'Putra.'

(1) Cole. Dig., Vol. II, 520, CCCIX. (2) Yajnavalkya, Chap. I, 78.
(3) Vasishtha, Chap. XVII, 2, 3 and 4. (4) Not found.
(5) Not found—attributed to Manu in some places.

CHAPTER XXXIII.

On Contemptible Sons.

On this subject, Manu says: "The son begotten upon the wife of another not authorised and the son begotten on the mother of a son by her brother-in-law are unfit to share in the inheritance, being the son of an adulterer and being produced through lust respectively."(1) *Commentary*—'Anuyuktāsutah' means 'the son begotten upon a woman authorised neither by her husband, nor in default of him, by her Guru.' 'Share in the inheritance' means 'share in the wealth of the owner of the soil.' This also indicates his unfitness to offer *pinda,* etc. Considering the text of Nārada which follows, this text applies to sons begotten upon a wife to whose husband no fee had been paid (by the begetter).

Manu again says: "Even the son begotten upon a woman appointed to raise offspring, if begotten in violation of the rules, is unfit to share in the paternal wealth; for he was begotten by an outcast."(2) *Commentary*—'Avidhánatah' means 'not according to the rules prescribed in the matter of Niyoga.'

Gautama says: "The son begotten upon a woman by another while her brother-in-law is alive takes no share."(3) *Commentary*—A son begotten by another upon a woman whose brother-in-law is alive, takes no share.

Nárada says: "Sons begotten by one or by many upon a woman not authorised are not entitled to share the wealth. They are all sons of their begetters only. They shall offer the *pinda* to their begetters in case a price had been paid for their mother. If no price had been paid, they shall give the *pinda* to the husband of the mother."(4) *Commentary*—'Anuyuktáyam'. means 'unchaste from desire.' They shall take no shares, *i.e.,* do not inherit the wealth of the owner of the soil. Prakásakára, however, says that they do not inherit the wealth of their mothers, their mothers' husbands and their maternal grandfathers. As for the right to offer *pinda,* they should offer it to their begetter where a price had been paid for their mother, *i.e.,* where the owner of the

(1) Manu, Chap. IX, 143. (2) Manu, Chap. IX, 144.
(3) Gautama, Chap. XXVIII, 23. (4) Narada, Chap. XIII, 19 and 20.

seed had taken their mother after paying a price to her husband. The last provision of the text is but reasonable.

Nárada in speaking of the twice-married woman and the adulteress says: "The son begotten on such of these women as have been bought for a price belongs to the begetter. But the son of those for whom no price was paid belongs certainly to the husbands of such women."(1)

Manu says: "Where two sons begotten by two different fathers contend for the property in the hands of a woman, each shall take to the exclusion of the other what belonged to his father."(2) *Commentary*—The woman here meant is neither a prostitute nor a twice-married woman nor an adulteress. So says Párijáta.

Here ends the chapter on contemptible sons.

CHAPTER XXXIV.

On Inheritance to the Wealth of the Sonless Deceased.

On this subject Manu says: "The widow of the sonless deceased shall raise up to him a son by one of the same *gotra* and deliver to that son the whole wealth of the deceased."(3) *Commentary*—The wife of the sonless deceased shall raise up an offspring to him by her brother-in-law or other *sapinda* and deliver to that son all the property which belonged to her husband and shall not appropriate it herself. So says Párijáta; but Prakásakára says that the king should send for that son through a *sagotra* and give him all the property. In the result, there is no difference.

Vriddha Manu says: "A widow who has no male issue, who keeps the bed of her lord inviolate and who faithfully discharges the duties of her widowhood shall alone offer the *pinda* and inherit all his wealth."(4) *Commentary*—'Having no male issue,' *i.e.*, of any of the twelve kinds enumerated. 'Vrite' means 'in the duties of widowhood.'

Brihaspati says: "In the holy writ, in law and in the practice of the world, a wife is declared by sages to be half the body of her

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(1) Narada, Chap. XII, 54. (2) Manu, Chap. IX, 191.
(3) Manu, Chap. IX, 190. (4) Cole. Dig., Vol. II, 535, CCCCVIII.

husband, sharing equally the fruit of pure and impure acts. Of him whose wife is not dead, half the body lives. How should any one else take his wealth, while half his body lives? Although there are his *sakulyas*, his father, mother, and uterine brothers, the wife of the sonless deceased inherits his wealth. A wife dying before her husband takes away his consecrated fire (Agnihotra) and dying after him she takes, if faithful to him, his wealth. This is an eternal law. Having taken all his moveable and immoveable property, the gold, the silver, grain, chariot and clothing, she shall cause to be performed his monthly, six-monthly and other *sraddhas*. Let her propitiate with oblations and pious gifts her husband's paternal uncle, Guru, daughter's son, sister's son and maternal uncle, likewise the aged and the helpless, guests and women of the family."(1) *Commentary*—Some say that even the *Pārvana sraddha* should be performed by a woman. To contradict it the author here enumerates the *sraddhas*, as the monthly, six-monthly, etc: By 'monthly *sraddhas*' is here meant the twelve monthly *sraddhas*. By 'six-monthly *sraddhas*' is meant the two *sraddhas* to be performed within six-months of the death. By the term 'ádi' is meant 'the *sraddha* to be performed on the eleventh day after death, the *Sapindīkarana sraddha* and the anniversary performable each year on the date corresponding to the date of death.' Therefore, she should not perform any other. Otherwise, seeing that these *sraddhas* are enjoined by other texts, this text would become superfluous. The *nich* suffix in 'dhápayet' (shall cause to be performed) is used in *svāarta* as in 'Rámorájyamakárayat,' meaning 'shall perform.' 'Faithful to her lord' means 'chaste.' But Udayakára in his commentary on Manu says that the term 'pativratā' is used in its primary sense and as chastity ends in *Sati*, says that the word 'dhāpayet' means (shall cause to be performed) have no right to perform *sraddha*, etc., many do not zealously care for it. Where there is the chaste wife, she takes the wealth of her sonless husband.

Nārada says that in default of the wife, the daughter is entitled. "In default of sons, the daughter succeeds; because of her continuing alike the lineage. Both a son and a daughter continue the lineage of their father."(2)

(1) Brihaspati, Chap. XXV, 46—51. (2) Narada, Chap. XIII, 50.

Manu says: "As is one's self, so is one's son. The daughter is equal to the son. How can another take the wealth when she, who is one's self, is alive?"(1)

Brihaspati says: "The daughter like the son springs from the several limbs of a man. How could another person then take her father's wealth while she lives. Equal to her father, and married to one equal to the son, virtuous and attending to his wants and doing him services, she shall take her father's wealth, whether she has been expressly appointed or not."(2)

Again Brihaspati says: "When a man dies leaving neither wife nor male issue, the mother should be considered as her son's heiress or a brother with her permission."(3) *Commentary*—'With her permission' means 'with the permission of the mother.'

Manu says: "The mother shall take the wealth of her childless son; and when even the mother is dead, the paternal grandmother shall take the wealth."(4) *Commentary*—'Childless' here means 'having no son, wife, etc.' The right of the paternal grandmother should be understood to accrue in the absence of the father, the brother and the *sapinda*; for the right of the father, etc., in default of the mother, etc., is established. 'Dáyádyam' means 'wealth inheritable by heirs.'

Gautama says: "The wealth of the deceased brother not reunited goes to the eldest."(5) *Commentary*—'Not reunited' means 'divided.' If among such brothers one dies without issue, his wealth goes to the eldest brother. This is the meaning. This rule should be understood as applying where the deceased has left no wife, mother or father.

Manu says: "The father shall take the wealth of the sonless son deceased; or the brothers. To three, libations of water must be offered and to three the *pinda* is given. The fourth is the giver of them and the fifth has no concern. To the nearest among the *sapindas* goes the wealth of the deceased. After them all, a *sakulya*, the spiritual teacher or the pupil takes it."(6) *Commentary*

(1) Manu, Chap. IX, 130.
(2) Brihaspati, Chap. XXV, 56 and 57.
(3) Brihaspati, Chap. XXV, 63.
(4) Manu, Chap. IX, 217.
(5) Gautama, Chap. XXVIII, 27.
(6) Manu, Chap. IX, 185, 186 and 187.

—'Sonless' means 'having no sons either primary or secondary.' 'Anantara' means 'nearest.' 'The wealth,' i.e., of the sonless deceased. 'Sakulya' means 'Samānodaka.'

Paithīnisi says: "The wealth of the man dying without male issue goes to his brother. In default of brothers, the father and mother shall take it; or his wife not the eldest or a man of the same *gotra* or a pupil or a fellow-student takes it."(1) *Commentary* —'Not the eldest' means 'one performing some of the duties of a widow and not all of them'; for one of the latter kind is superior to the brother in the matter of inheriting the wealth of the husband. Nor does the word 'wife' include an unchaste woman, because she should be driven away from the family. 'Sabrahmachári' means 'a fellow-student.' As regards the text of Sankha which says that maintenance should be given to women for life, if they keep the beds of their husbands inviolate and that others should be driven away, that applies to women who, without performing the duties of widowhood, are not unchaste. As for the text of Yajnavalkya that parents and brothers likewise inherit, that applies to property acquired by the father, the paternal grandfather, etc. But property acquired without detriment to the paternal wealth goes certainly to the brothers even while the parents are alive.

Devala says: "Next, uterine brothers shall divide the wealth of the sonless deceased, or daughters who are equal, or the father if living. In default of these, brothers equal in class, the mother and the wife in the order mentioned; in default of all these, the members of the family living with him."(2) *Commentary*—'Daughters equal' means 'uterine sisters.' After 'father if living,' 'and desirous' is understood. Here Halāyudha interpreting the expression 'in the order' to mean 'in the order pointed out by Yajnavalkya, etc.,' reconciles the apparent contradiction in the passage beginning with 'this is the gist of the rules on this point.' The list of heirs in their order to the wealth of a deceased sonless Brahmin beginning with the wife and ending with the *Srotriya*, and the list of heirs in their order to the wealth of a deceased sonless non-Brahmin from the wife down to the king have been given. The object of the author of the Kalpataru in quoting the texts of

(1) Cole. Dig., Vol. II, 536, CCCCX. (2) Cole. Dig., Vol. II, 532, CCCCIV.

Yājnavalkya and Vishnu after that of Devala is to show that in interpreting the text of Sankha and Likhita a far-fetched construction should be made and that into the text of Devala which does not prescribe the order among heirs, the order mentioned in the texts of Yājnavalkya and Vishnu should be read. But as a matter of fact there is really no conflict, seeing that the rule of Paithinisi, which says that the wealth of a sonless deceased goes to his brother, applies to property other than that acquired by the father and the paternal grandfather and that the next portion following it, *i.e.*, the mother and the father taking in default of brothers, does not prescribe the order.

Yājnavalkya says: "The wife, the daughters, both parents, the brothers, their sons, kinsmen of the same *gotra*, distant kindred, a pupil and a fellow-student; of these on failure of the first mentioned, the next in order takes the wealth of a sonless man who has gone to heaven. This law applies to all classes." (1) *Commentary* —The meaning is that of the wife, the daughter, the mother, the father, the brothers, brothers' sons, kinsmen of the same *gotra*, distant kindred, a pupil and a fellow-student, in default of those previously mentioned, the one succeeding becomes the heir. The wife here contemplated is the wife possessing excellent qualities. 'Sonless' here means, according to Prakāsakāra, 'having no son, grandson or great grandson.' This is correct according to the legal sense of the term. Although the use of the word 'parents' at the first glance suggests that both the father and the mother have joint rights of inheritance, still seeing that from the text that the mother should be regarded as the heiress of her son dying without wife and male issue, the right of the mother independently of the father and in default of the wife and the male issue is recognised, it is indicated that the father's right accrues in default of the mother.

Vishnu says: "The wealth of a man dying without male issue goes to his wife; in default of her, to his daughter; in default of the daughter, to the father; in default of the father, to the mother; in default of the mother, to the brother; in default of the brother, to the brother's son; in default of the brother's son, to the *Bandhus;* in default of the *Bandhus*, to the *Sakulyas;* in default of them, to

(1) Yajnavalkya Chap., II, 135 and 136.

the fellow-student; in default of him, to the king, except the wealth of a Brahmin."(1) *Commentary*—'*Bandhus*' means '*Sapindas*.' '*Sakulyas*' means 'men of the same *gotra*.' So says Misra.

After speaking of the daughter and her son, Brihaspati says: "In default of these, uterine brothers or brother's sons, agnates, cognates, pupils or learned Brahmins are entitled to the wealth of the deceased. Where a man dies leaving no issue, nor wife nor brother nor father nor mother, all his *Sapindas* shall divide his wealth in due shares. Half of the whole wealth, however, shall be reserved from the division for the spiritual benefit of the deceased and carefully assigned for the performance of his monthly, six-monthly and annual *sraddhas*. When there are several relatives, agnates and cognates of the sonless deceased, the nearest among them shall take his wealth."(2) *Commentary*—The locative case in 'Shánmásikè,' etc., has the force of the ablative.

In respect of the sonless deceased, Apastamba says: "In default of sons, the nearest *Sapinda* takes the wealth. In default of *Sapinda*, the spiritual teacher; in default of him, a pupil, takes it, and shall use it for the benefit of the deceased; or the daughter may take it."(3)

Baudhāyana says: "The great-grandfather, the grandfather, the father, one's self, his son, his grandson and his great-grandson, these they call *sapindas*, being sharers of undivided oblations. The sharers of divided oblations they call *Sakulyas*. Where there are no sons, the wealth goes to the *sapindas*; in default of sapindas, the *Sakulyas* take it; on failure of the Sakulyas also, the spiritual teacher, the pupil or the *ritwik* takes it. In default of all these, the king."(4) *Commentary*—This terminology applies to cases of inheritance and not to cases of pollution, etc. There those who are alike in *pinda* are *sapindas*; and even such of them as are divided would be *sapindas*; but here such as are divided are not *sapindas*. 'Son,' *i.e.*, sons of the body, etc. 'It goes to them' means 'it goes to the *sapindas*.'

Nārada says: "In default of daughters, the *Sakulyas* succeed; in default of them, the *Bandhus*; after them, men of the same

(1) Vishnu, Chap. XVII, 4—13. (2) Brihaspati, Chap. XXV, 51—62.
(3) Apastamba, II, 6, 14, 2—4. (4) Baudhayana, I, 5, II, 9—14.

caste; in default of all, the wealth goes to the king, unless it should be a Brahmin's. A king intent on virtue should allot maintenance to his women. Thus has the law of inheritance been declared."(1) *Commentary*—'Sakulyas' are the sons of paternal uncle, etc. 'Sajatyah' means 'men of the same caste.' The rule about maintenance applies to cases of Brahmin women thoroughly indigent.

Manu says: "In default of all, Brahmins versed in the three Vedas, pure and self-controlled, shall take the wealth. So does virtue not diminish. The wealth of a Brahmin should never be taken by a king. This is settled law But the wealth of the men of the other castes, the king may take in default of all. The king except in the case of the Brahmin's wealth, shall take the property to which there is no heir in all cases; but the wealth of an heirless Brahmin he shall cause to be given to learned Brahmins."(2) *Commentary*—'Adāyakam' means 'heirless.'

Baudhayana says: "The wealth of a Brahmin destroys the taker and his sons and grandsons. Poison kills the taker only. Therefore the king should never take the wealth of a Brahmin."(3) *Commentary*—What is called the Brahmin's wealth is the worst of poisons.

Brihaspati says: "The king shall take the wealth of a Kshatriya, Vaisya or Sudra dying without male issue, wife or brother; for he is the lord of all."(4)

Sankha and Likhita say: "The property of a learned Brahmin goes to the Brahmins and not to the king. Wealth dedicated to the Gods or Brahmins should not be taken by the sovereign; nor may he take a deposit, open or sealed, or wealth descending from father to son or belonging to infants or women; for the Veda declares: "The wealth of women or of infants should not be taken by the king, nor the sixfold acquisition of women, nor the patrimony of infants."(5) *Commentary*—The word 'Parishad' means 'Brahmins.' 'Upanidhi' means 'a kind of deposit.' Párijáta says, that 'kramāgatam' means 'inherited from ancestors.' 'Sixfold

(1) Narada, Chap. XIII, 51 and 52. (2) Manu, Chap. IX, 188 and 189.
(3) Baudhayana, I, 5, II, 16. (4) Brihaspati, Chap. XXV, 67.
(5) Cole. Dig., Vol. II, 573, CCCCXLVII.

acquisition' means 'wealth received in six ways, such as before the sacrificial fire, etc.'

Manu says: "The king shall protect the wealth inherited by an infant till he is married, or till he have passed his infancy."(1) *Commentary*—He should protect the wealth of the infant from being seized by his *sapindas*.

Vishnu says: "The king shall protect the wealth of infants, helpless men, and women."(2)

Sankha and Likhita say: "The king should protect the wealth of infants who are incapable of managing their own affairs and of the widows, of Brahmins and valiant soldiers. But the wealth of which there is no owner goes to the king."(3) *Commentary*—The king must guard the wealth of these women in the absence of their husbands.

Baudhayana speaking of the rights of sons says: "If they are incapable of conducting their own affairs, the king should well protect their shares with the accumulations thereon till they attain their age."(4) *Commentary*—'With the accumulation' means 'with the increase.' 'Well protected' means 'carefully guarded.' 'Till' is used in the sense of restriction meaning 'before they have attained or completed in their seventeenth year.'

Kātyāyana says: "Let all the co-heirs protect the share of an absent co-parcener; but if he dies leaving an infant son, the whole wealth must be preserved by the kinsmen of that son, and they shall divide it in proper shares after the minor has attained his age."(5) 'Bālaputre' means 'having an infant son.' 'Pogandah' means 'infant incapable of managing his affairs.'

Vishnu says: "He who also takes a share should give the pinda."(6)

A Smriti says: "He who takes the wealth should perform the *sraddha* to the owner of the wealth and should give the pinda to three ancestors."(7) *Commentary*—The word 'sraddha' here

(1) Manu, Chap. VIII, 27.
(2) Vishnu, Chap. III, 65.
(3) Cole. Dig., Vol. II, 575, CCCCLI.
(4) Cole. Dig., Vol. II, 575, CCCCLII.
(5) II Cole. Dig.
(6) Vishnu, Chap. XV, 40.
(7)

denotes the *proshita shraddha* and the *ekoddhishta,* etc. So says Prakāsakāra.

Brihaspati says: "The brother or the brother's son or the *sapinda* or the pupil having performed the *sapindaikarana* shall obtain prosperity."(1)

Vasishtha says: "The son even though he receives no patrimony shall offer the pinda."(2)

Vishnu says: "The preceptor or the pupil shall take the wealth of an ascetic."(3)

Yājnavalkya says: "The heirs of an ascetic and a *sanyasin* and of a *brahmachárin* are in order the preceptor, the virtuous pupil and the fellow-student and brother in virtue."(4) *Commentary*—'In order' means 'in the inverse órder.' Thus the preceptor shall take the wealth of a *brahmachárin;* the virtuous pupil, the wealth of a *sanyasin.* 'Virtuous,' *i.e.,* skilled in hearing, remembering and practising the truths of the Vedanta Sastra. The fellow-student and brother in virtue takes the wealth of an ascetic. 'Brother in virtue' means 'associated with him as brother in the performance of religious duties.' 'Fellow-student,' *i.e.,* a pupil of the same preceptor and belonging to the same order. Although this rule conflicts with the text of Vasishtha which says that men in other orders take no shares, it must still be reconciled on the supposition that the ascetic may sometimes come by property.

Here ends the chapter on the inheritance to the wealth of the sonless deceased.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Ranga Ayyar *v.* Srinivasa Ayyangar, I. L. R., 21 M., 56. This decision is a remarkable instance of a new tendency which has developed in the Madras High Court for the last few years to decide second appeals finally, even where according to law, it would be necessary to have a finding of the lower appellate Court upon a question of fact. To call for a finding from the lower Court for the decision of a question necessarily involves delay in the disposal of the case. But

(1) Brihaspati, Chap. XXV, 101. (2) Found in Vishnu, XV, 43.
(3) Vishnu, Chap. XVII, 15 and 16. (4) Yajnavalkya, Chap. II, 136.

it is difficult to see how the inevitable delay can be an argument in favor of the High Court assuming power which it did not possess. In the case under notice, the defendant had conveyed the property to the plaintiff's predecessor and pleaded that it was a sham sale executed *benami*. The District Judge on appeal upheld this contention for several reasons. The property had remained in the possession of the alleged vendor, the patta was not transferred, and the sale-deed remained in the vendor's possession. These were undoubtedly circumstances which the Judge was entitled to consider in determining whether the sale was benami or not. On second appeal, the High Court reversed this finding. The question was purely one of fact and the High Court, as practitioners are often told where there is no disposition to interfere, had no power to pronounce upon it in second appeal. Assuming that the Judge had overlooked that the onus lay heavily on the defendant alleging that it was a benami sale to prove it, the only course open to the High Court was to draw the attention of the lower appellate Court to that fact and to ask for a fresh finding. But here the High Court set it aside and gave a decree for the plaintiff. The ways of the Madras High Court are really peculiar.

Muthappudayan *v.* Ammani Ammal, I. L. R., 21 M., 58. The question in this case relates to the rule of succession to the *stridhana* of a woman given to her after marriage. The Mitakshara rule is that the daughters succeed in preference to sons. But the Smritichandrika makes her an heir jointly with the son. The learned Judges followed the authority of the Mitakshara as it was supported by Smriti texts and the Saraswati Vilasa. The decision appears to us to be correct, and we welcome it as upholding the rights of women.

Subramania Ayyar *v.* Saminatha Ayyar, I. L. R., 21 M., 69. The question in this case was an interesting one. In the case of an exchange, express covenant to indemnify in a certain manner in case of loss by defective title excluded the implied covenant in S. 119 of the Transfer of Property Act that the parties should be restored to their original position. The learned judgment of the Court places the matter upon a clear footing. The argument that the express covenant was only supplementary to the covenants implied did not find favour with their Lordships.

Nabbu Khan *v.* Sita, I. L. R., 20 A., 2. The Code of Civil Procedure takes no notice of lunatics not adjudged under the Act, and no procedure is laid down in the case of such persons. It is difficult to treat them as normal persons, because they are not adjudged; for hardship

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and injustice will result if suits are to be prosecuted or defended by them. It is pointed out in *Tukaram Anant Joshi* v. *Vithal Joshi*, I. L. R., 13 B., 656, that the provisions of the Code are not exhaustive, and that they should be represented by a next friend or a guardian *ad litem*, as the case may be. The Allahabad High Court has rightly followed this decision.

Puran Mal *v.* **Krant Singh**, I. L. R., 20 A., 8, S. 544 of the Civil Procedure Code has been often misunderstood, and the Allahabad High Court has done well to draw attention to the conditions necessary for the application of that section. The lower Court should have proceeded upon a ground common to the defendants, and the appellant should appeal against the whole decree so as to include the interests of the other defendants as well. It is only then that the appellate Court has the power to interfere even on behalf of defendants not appealing.

Amjad Ali *v.* **Muhammad Israil**, I. L. R., 20 A., 11. The Court Fees Act is becoming a regular snare to persons instituting suits or preferring appeals. It is an old unintelligible enactment, and there are numerous difficulties in construing its provisions in determining the proper fee for a plaint or memorandum of appeal. The Court Fees Act says that a plaint and memorandum of appeal insufficiently stamped is of no validity whatever. The provision was practically treated as one having no reference to limitation until the Allahabad High Court made the discovery twenty years after it became law. The Legislature tried to correct the Allahabad view by a blundering piece of legislation contained in S. 582-A, whereby, except where the insufficiency arose from mistake, an appeal upon an insufficient stamp was set to be not properly presented for purposes of limitation. The special provision thus enacted in the case of appeals suggests by implication that mistake is no ground of excuse in the case of a plaint insufficiently stamped. Instead of construing all these fiscal enacments strictly and in favor of the subject, some of the Judges of the Madras High Court are discovering methods for the disposal of suits and appeals by holding them not properly presented. We cannot understand what possible object the Legislature can have in enacting fiscal provisions except to raise some revenue for the administration of justice and to keep down vexatious litigation. It could never have been in any body's mind that people should be misled by paying a smaller fee in order that the moment the period of limitation has expired they might be told that there was no plaint before the Court. As well might the Legislature take away the right of action or of appeal.

Thika Ram v. Sama Charan, I. L. R., 20 A. 42. The learned Judges who decided this case appear to us to have gone wrong in supposing that the Privy Council in *Mussummat Lachhan Kunwar* v. *Anant Singh*, 22 I. A., 25, has overruled the decision in *Ram Kali* v. *Kedar Nath*, 14 A., 156. After the Limitation Act of 1871 came into force, even though possession by a stranger was adverse to a Hindu widow, the reversioner could sue within 12 years from the date of the widow's death for the recovery of the property. Act XV of 1877 lays down the same rule. A different rule has of course prevailed under the Limitation Act of 1859, according to which time ran against the reversioner during the life-time of the widow, or from her death, according as the possession of a stranger was adverse to the widow, or derived from her. What the Privy Council in 22 I. A. had to decide was that the rule of *res judicata* by representation applied where a decision adverse to the life-owner had been passed in a prior suit. Where no such suit has been instituted, the language of the Law of Limitation is perfectly clear that time runs only from the date of the death of the life-owner. This view has been accepted and followed by the Calcutta High Court in numerous cases and also by the Madras High Court.

SUMMARY OF RECENT CASES.

Limitation Act (XV of 1877, sch. II, Ss. 36, 39, 48, 49, 109—

Crops when cut—Specific movable property.

Mungun Jha v. Dulhin Golab Koer.

Held—By the Full Bench (*Rampini, J.*, dissenting) that a suit for damages for cutting and carrying away crops does not fall withing the terms of Art. 36, sch. II.

Per Maclean, C. J. (*Trevelyan, J.*, assenting) :—that if the case does not come within Art. 39, it falls within Art. 49, as the crops having been severed from the soil it became specific movable property, and the fact that the severance was a wrongful act of the tort-feasor made no difference.

Per Macpherson, J.—That the case comes within Art. 49 or Art 48, as crops after being cut are specific movable property, possibly also under Art. 109, if it is not brought under Art. 39.

Per Ghose, J.—That Art. 49 applies to the case.

Sarat Lal Mundal v. *Umar Haji* (1) followed; *Pandah Gazi* v. *Jenuddi* (2), distinguished by *Macpherson* and *Ghose*, JJ., and dissented from by *Trevelyan*, J.:—2 *Calcutta Weekly Notes*, 365.

Promissory note, endorsement of—Negotiable Instruments Act (*Act XXVI of* 1881), *S.* 8—*Benamidar.*

Sarat Chunder Dutt *v.* Kedar Nath Dass.

An endorsement legally made of a promissory note forwarded by delivery of it to the endorsee makes him the "holder" of it within the meaning of S. 8 of the Negotiable Instruments Act, and he can sue upon the note, although he may be a *benamidar* of the real owner of the note ;—2 *Calcutta Weekly Notes*, 286

Act IV of 1882 (*Transfer of Property Act*), *S.* 135—*Actionable claim—Person claiming the benefit of S* 135 *not obliged to pay the amount paid by the assignee before judgment.*

Phul Chand *v.* Chhote Lal.

Held that a person who is entitled to claim the benefit of S. 135 of the Transfer of Property Act of 1882 does not lose the benefit of that section if he puts the assignee to proof of the price paid by him and waits until the amount of the price has been determined and declared by the Court. There is nothing in the section to preclude the debtor from securing his discharge by payment of the decree. *Rani* v. *Ajudhia Prasad* (I. L. R., 16 A. 315); *Muchiram Barik* v. *Ishan Chunder Chuckerbutti* (I. L. R., 21 C. 568); *Jani Begam* v. *Jahangir Khan* (I. L. R., 9 A. 476); *Hakim-un-nissa* v. *Deonarain* (I. L. R., 13 A. 103); and *Nilakanta* v. *Krishnasami* (I. L. R., 13 M. 225) :—*The Allahabad Weekly Notes for* 1898, *p.* 54.

Act IV of 1882 (*Transfer of Property Act*), *S.* 85—*Civil Procedure Code, S.* 43—*Cause of action—Mortgage—Holder of two mortgages on the same property suing separately on each.*

Sundar Singh *v.* Eholu.

There is nothing to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant to either of them, from obtaining a decree for sale on each of them in a separate suit :—*The Allahabad Weekly Notes for* 1898, *p.* 58.

Hindu law—Joint Hindu family—Rights of son in joint ancestral property—Mortgage.

Bhagirathi Misr *v.* Sheobhik.

A member of a joint Hindu family has no power in his father's lifetime to make a mortgage of any part of the ancestral family property. *Balgobind Das* v. *Narain Lal* (I. L. R., 15 A. 339) and *Madho Parshad* v. *Mehrban Singh* (I. L. R., 18 C. 157) referred to:—*The Allahabad Weekly Notes for* 1898, *p.* 59.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Law of Easements, 2nd Edition:—by R. B. Michell, M.A., Bar.-at-Law, printed and sold at the *Lawrence Asylum Press, Mount Road, Madras.*

The Yearly Abridgment of Reports for 1897:—by Arthur Turnour Murray, B.A., Bar.-at-Law, published by Butterworth and Co., 7 Fleet Street, London, E. C.: Price, *s.* 12/6.

The Albany Law Journal for April (*in exchange*).

The Calcutta Weekly Notes for April (*in exchange*).

The Allahabad Weekly Notes for April (*in exchange*).

The Green Bag for April (*in exchange*).

The Canadian Law Times for April (*in exchange*).

The Harvard Law Review for April (*in exchange*).

The Canada Law Journal for April (*in exchange*).

The Educational Review for April. (*in exchange*).

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A pathetic incident relating to Justice Field, who recently retired from the U. S. Supreme Court, was thus reported in the New York Sun: An unwritten law of the Supreme Court transfers to a new member of the body the messenger who has served the justice whose death or retirement made the vacancy he is called upon to fill. When Mr. Justice McKenna was sworn in and took the place vacated by Mr. Justice Field, William Bruce, the colored servitor who had been the aged jurist's faithful attendant for a third of a century and more, informed Justice Field that he was going to serve Justice McKenna in

the future, and would have to say good-by. This was a situation which evidently Justice Field had not contemplated, and the announcement almost overmastered him. In faltering tones he said to Bruce: "Why, William, you aren't going to leave me, are you?" The faithful servant nearly broke down as he told the judge he was compelled to do so, and a pathetic scene ensued. As soon as the venerable jurist could collect himself, he exclaimed: "If I had known that you would not stay with me now I wouldn't have retired":—*The Albany Law Journal.*

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The following *Legal Laughs* are taken from the *Albany Law Journal.*

A certain eminent judge who was recently re-elected, when he was asked about the facility with which he turned from one case to another, answered that he had learned that from what he saw at a baptism of colored people when he was a boy. The weather was very cold, so that to immerse the candidates they were obliged to break away the ice.

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A plaintiff kept interrupting the defendant. Judge Bacon—"Be quiet!" Plaintiff—"But I can't keep still and listen to such lies." Judge Bacon—"Try and imitate me. I have to."

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Southern Justice—"Bill, I find yo' guilty of shootin' th' nigger an fine yo' one dollah—that is, ef yo' kin spare it."

Prisoner (indignantly)—"One dollah, Si Jenkins! Do yo' mean to say yo' are goin' to fine me one dollah foh on'y shootin' a nigger?"

Southern Justice (apologetically)—'Yais, Bill. I know it's a trifle stiff, but this cote needs the money, an' I'll take it off next time, too."—Judge.

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A Lawyer and his Client:—Of course, Webster was in demand by those who could afford to pay for his services, says the Boston Herald. A sharp Nantucket man is said to have got the better of the great defender of the constitution in an amusing way, however. He had a small case which was to be tried at Nantucket one week in June, and he posted to Webster's office in great haste. It was a contest with a neighbour over a matter of considerable local interest, and his pride as a litigant was at stake. He told Webster the particulars, and asked what he would charge to conduct the case. "Why," said Webster,

"you can't afford to hire me. I should have to stay down there the whole week, and my fee would be more than the whole case is worth. I couldn't go down there for less than $ 1,000. I could try every case on the docket as well as one, and it wouldn't cost any more, for one case would take my time for the entire week, anyway." "All right, Mr. Webster," quickly responded the Nantucketer. "Here's your $ 1,000. You come down, and I'll fix it so you can try every case." Webster was so amused over this proposition that he kept his word. He spent the entire week in Nantucket, and appeared on one side or the other in every case that came up for hearing. The shrewd Nantucketer hired Daniel out to all his friends who were in litigation, and received in return about $ 1,500, so that he got Webster's services for nothing and made a good profit to boot. If that man were alive in these days of trusts and syndicates, he would probably be at the head of a legal trust controlling the services of all the big lawyers of the country.

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Dogs as witnesses :—In the recent case of *Walter Pedigo* v. *Commonwealth of Kentucky* decided by the Court of Appeals of that State, last week, the very interesting question of the value of dogs as witnesses was passed upon. It was in the somewhat celebrated "blood-hound witness case," as it is commonly known. The following is the dissenting opinion of Judge Guffy:

I concur in the reversal of the judgment in this case, but dissent from so much of the majority opinion as holds that the trailing or proven trailing of the defendant by a blood hound can be introduced as evidence upon the trial of such person charged with any crime. It is true that the majority opinion so restricts such proof and requires so many conditions precedent that, if the opinion in question should be strictly adhered to, no great injustice would very often result from evidence admitted under the ruling in question.

It, however, seems to me, with due respect to the majority opinion that such a rule of evidence is contrary to all other rules of evidence, and if not in violation of the letter of the constitution, is manifestly in violation of the spirit as heretofore expounded by this court. Such a rule seems to me an innovation upon all the heretofore established rules of testimony. The use of blood hounds was, perhaps, necessary to efficiently and effectually uphold the institution of slavery, as well as to aid in the arrest and capture of persons accused of crime in the dark ages. In such cases, however, the object sought was the arrest or capture of known fugitives. If the dog in fact took up and followed

the trial of a fugitive, and found him, or aided his pursuers to find him, the object was accomplished, and there could be no mistake as to whether he was the party sought or not. His guilt and right of capture having been theretofore established, and, in fact, being unquestioned. If the hound took the wrong trail and brought to bay the wrong party, that fact would be ascertained so soon as the pursuers reached the party, and the utility of the hound in that regard then ceased. It is now proposed to use the hound, not to capture a fugitive, but to ascertain or furnish evidence to convict some citizen of crime. It seems to me that this new use of the blood hound is a radical departure from the former purposes for which they were used; but whether this be so or not, it seems to me that neither the life nor liberty of a citizen should be taken away, or even jeopardized, by the mere fact that some person testified that the hound was well trained to track human beings, etc., and that he had trailed the accused from the scene of the crime to the habitation of the accused, or until he came upon the accused party. There is danger that the effect of the majority opinion will likely be to greatly promote the raising and training of blood hounds, or hounds that will be called blood hounds. It is a well-known fact that the owners of hounds, as well as other property, usually hold such property in high esteem; and as the owner or trainer of hounds will be engaged in the business for pay, it will be greatly to their interest to always have well-trained hounds. In fact, I presume there will be none but trained and expert hounds in a few years, at least such will be the opinion of their owners, for it would be uttterly useless to have any other sort.

It is common tradition, and doubtless believed by quite a large number of persons, that blood hounds are capable of wonderful feats of trailing. In fact, the many wonderful stories told of the achievements of blood hounds (mostly in the imagination of those originating them) have instilled into the minds of quite a number of persons such wonderful notions of the unerring, if not infallible, knowledge and intelligence of the hounds that the fact that the *hound said* that a certain person had lately been at the place where the crime was committed would be the most conclusive proof that could be produced.

If it should even be conceded that every owner and trainer of hounds would be perfectly fair and impartial in endeavoring to strike the trial only of the party who had been at the scene of the crime, and likewise impartial in his testimony as to the expertness of the dog; yet such evidence is entirely too vague and uncertain to be allowed to jeopardize the liberty of a freeman. It seems from common history, as

well as the proof in this case, that the blood hound is supposed to be capable of taking up and following the trail of a human being that has been made from 24 to 40 hours. If that be true, and it is unreasonable, then it must necessarily follow that the hound aforesaid could take up the scent of a man who had passed within a quarter of a mile of the place a few hours before the hound was taken to the place to find the scent. I think this conclusion necessarily follows. Take, for example, the case at bar. It seems that the barn was located in an open field, and the prosecution would have us believe that many hours thereafter the hound was able to take the trail and follow it. It is reasonably certain that a man wearing shoes would leave less scent on the ground to remain for 12 or 15 hours than he would leave if going through timber. It, therefore, follows, as I think, that if a hound was taken to the scene of the crime, or supposed crime, and any person had passed, shortly before the arrival of the dog, within a quarter of a mile of the place, especially if his route lay through timber, the dog finding no scent at the point where he was taken to search for same, and knowing, if he knew anything, that he was desired to trail some human being, he would naturally go to the place and in the direction of the scent, or, in other words, would find the trail by reason of his acute scent of some person who had passed sufficiently near the place to enable the hound to take up the scent. It would be impossible to demonstrate whether or not he found the actual trail at the spot to which he was taken, or whether, as all dogs will do when it is sought to put them on a trail, he commenced hunting for one, and so continued until a trail was found in that vicinity.

It may also be assumed as certain that the hound would take up the first trail or follow the first trail that reached or affected his olfactory nerves after it was made known to him that he was there for the purpose of trailing somebody. I do not think it is possible to establish the fact that the hound will not quit the first trail that he may take up and go off with another which he might happen to fall in with or cross. Doubtless his keeper would often be of the opinion that the hound would never take up a trail other than the one he first took.

I do not think that the evidence as to what the *hound said* or indicated should ever be admitted as testimony for the further reason that there is too much danger of an innocent person being convicted, or at least arrested and permanently disgraced by the admission of such testimony. This case illustrates the danger alluded to. From the evidence in this case it is highly probable that quite a number of persons went that very night to the dormitory, or to the house opposite the

dormitory, and if they happened to pass by or near the barn the dog of necessity was as apt to take one trail as another, and hence there would be no sort of certainty in his trailing the criminal if any there was. To illustrate further, it is learned from common rumor and from the press that a great many toll-gates have been lately destroyed, and it seems very difficult to ascertain who are the guilty parties. The gates are on the public highway, where persons pass, and have the right to pass and re-pass, yet if a blood hound should be taken to the scene of the crime within a reasonable time thereafter for the purpose of trailing the guilty party, he would be almost certain to find some trail, and trail some person to his home, and after having been sufficently shown to be an expert, etc., his testimony would be admitted to fix the guilt upon some party perhaps entirely innocent, and who, in the exercise of his right, had passed that way. The same may be said as to a large number of crimes supposed to have been clandestinely committed, or, in fact, have been committed. Many houses and barns are burned down. Some fires are of incendiary origin, while a number are the result of accidents or carelessness, yet, under the majority opinion in this case, it would seem that, if an expert hound trailed a party from the scene of the burning to his home, or place where he was known to have been shortly after the fire, that fact might be proven in evidence against him, although, in fact, he might not have been there at all, or if he had been, had simply been a casual passerby. Such evidence should not be admitted for the reason that the defendant is not permitted to cross-examine the witness, who in reality is the dog, whether he is the legal witness or not. I am aware that it has been held that you could prove dying declarations against the defendant, and it has been said that he has the consitutional privilege of meeting the witness face to face, because the party testifying is the one who is reciting the dying declarations, but the admission of the *statement* or trailing by the hound is not a parallel case. The trailing of the hound, if evidence at all, must be upon the supposition that he took the track at the scene of the crime and followed it, but the defendant has no chance to inquire of the hound how far from the place did he really find the trail, or did he cross any other or find any others. If a person was testifying to having tracked the defendant from or about the place, he could be cross-examined upon that subject to know whether there was any other track, and which appeared to be the freshest, and size, and whether the trail he was following crossed or fell in with other trails. Not so with the dog. He has had his say and left. There is another familiar rule of law, that A, a witness, will not be allowed to testify that B told him that he saw the defendant at the place, or that he

trailed him or saw him going from the scene of the crime; but it seems to be contended in this case that A may tell what the *dog said about it.* A person may be murdered in a highway or road that is rightfully traveled by numerous persons. 25 or 50 persons may have passed within less than a dozen hours, and upon the discovery of the crime a blood hound may be brought there,a nd if he has any of the attributes which he is generally credited with, he will certainly find some trail and land somewhere would it be right to allow that fact to be proven against the party accused of-the murder? If such evidence be admitted, it seems to me that a man might, in fact, be hanged without any other evidence than the mere fact that the blood hound was proven to have taken up the trail at the scene of the murder and followed it to the house of the defendant. Such evidence must tend to establish his guilt, else it could not be admitted, and if the jury upon such evidence found him guilty, how could this court reverse? It will not do to say that the jury will not convict a party upon such testimony. As matter of fact and common history, some party is very likely to be suspected of the crime, and after suspicion to a greater or less extent permeates the community, but little additional evidence is required to convict the accused, especially if he be defenseless or destitute of friends and facilities for making a defence.

It seems that if the conditions described in the opinion were complied with, the fact that the hound trailed a person from the scene of the crime would be sufficient to authorize a warrant of arrest, and would be such probable cause as to protect the party procuring the arrest, and thus a citizen might be put to great expense, mortification and disgrace without any evidence at all against him, except the trailing of the hound, and have no redress for any of the wrongs so inflicted. As before intimated, it seems to me that the use of the blood hound properly belonged to the days of slavery and of the bloody criminal code of the dark ages, and inasmuch as the institution of slavery and the code aforesaid have ceased to exist, the hound should be relegated to " innocuous desuetude ":—*The Albany Law Journal.*

REVIEWS.

Powell's Principles and Practice of the Law of Evidence, 7th Edition, by Cutler, B.A., and Cagney, B.A., published by *Messrs. Butterworth and Co., 7 Fleet Street, London.* Price, *s.* 20 :—We have great pleasure in recommending the 7th Edition of this

popular book to the profession. The book is as useful as it is handy, and while we are sure it will be largely appreciated by the profession, we think it is likely to be appreciated even better by the law-student, who is in search of a suitable text-book, which within the limits of a manageable size will give him a fairly adequate knowledge of the principles of the Law of Evidence. For the purpose of easy reference the leading principles are stated in the shape of propositions and are printed in bolder type so as to be easily distinguishable from the rest of the text. It is needless to add that the editors have spared no pains to make the book cover all the statutes passed and all the cases reported since the date of the last Edition.

The Law of Easements, by R. B. Michell, M.A., Bar.-at-Law, Chief Judge, Small Cause Court, Madras, *printed and sold at the Lawrence Asylum Press, Mount Road, Madras* :—We have nothing but praise for this edition of Mr. Michell's book on the law of Easements. Speaking of the first edition, we observed "the book has been written on the whole with great care and pains." The second edition deserves even more praise. The book has grown considerably larger in size and a much larger number of cases has been noted up. We do not know whether Mr. Michell's attention was drawn to the criticisms contained in our review, but we adhere to the views there expressed. The matters there dealt with are, however, of minor importance and do not detract from the value of the work which is likely to be highly useful to the student and the profession.

The Yearly Abridgment of Reports for 1897, by A. T. Murray, B.A., Bar.-at-Law, published by *Butterworth & Co.*, 7 *Fleet Street, London*, Price, *s.* 12/6 :—We have received from Butterworth & Co. a copy of the annual digest of the English reports for 1897, together with the principal Irish and Scotch cases reported in that year. The principles are carefully extracted from the decisions, and we have no doubt the book will be highly useful to the profession. Such a publication is of special value in India where the decisions of the English, Scotch and Irish Courts are not easily accessible.